

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.L., Appellant**

**and**

**DEPARTMENT OF DEFENSE, DEFENSE  
AGENCIES, Aviano, Italy, Employer**

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**Docket No. 18-1103  
Issued: March 5, 2019**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 7, 2018 appellant filed a timely appeal from an April 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$79,302.70 because she concurrently received Social Security Administration (SSA) benefits while also receiving FECA benefits for the period March 15, 2011 through December 12,

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the April 19, 2018 decision, OWCP received additional evidence and appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

2015; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation.

### **FACTUAL HISTORY**

On January 31, 2011 appellant, then a 61-year-old English/Second Language teacher, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back, neck, and head when she fell down a flight of stairs while at work on January 28, 2011. On March 3, 2011 OWCP accepted crushing injuries of multiple sites of trunk, cortex contusion without open wound, unspecified state of consciousness, sprain of back, lumbar region, brain stem contusion without open wound with concussion and lumbago. Appellant did not return to work. OWCP paid appellant wage-loss compensation on the periodic rolls as of October 23, 2011.

On EN1032 forms signed by appellant on February 23, 2012, February 24, 2013, March 24, 2014, and March 10, 2015, she indicated that she was not receiving SSA benefits as part of an annuity for federal service.<sup>3</sup>

By follow-up letter dated March 10, 2015, OWCP asked appellant if she was receiving retirement benefits from the Office of Personnel Management (OPM). In a response dated March 24, 2015, appellant informed OWCP that she did not receive OPM retirement benefits, and only received "regular" SSA retirement benefits.

On July 7, 2015 SSA forwarded a FERS/SSA dual benefits calculation form to OWCP. The form indicated that: beginning in March 2011 appellant's SSA rate with FERS was \$1,309.30 and without FERS zero; beginning in December 2011, her SSA rate with FERS was \$1,356.40 and without FERS zero; beginning in January 2012, her SSA rate with FERS was \$1,367.30 and without FERS zero; beginning in December 2012, her SSA rate with FERS was \$1,390.50 and without FERS zero; beginning in December 2013, her SSA rate with FERS was \$1,411.30 and without FERS zero; and beginning in December 2015, her SSA rate with FERS was \$1,435.20 and without FERS zero. In correspondence dated August 24, 2015, SSA informed OWCP that appellant had worked for the Federal Government from 1988 through 2013. SSA reported no other employer.

By letter dated January 19, 2016, OWCP notified appellant that, based on information provided by SSA regarding the amount her SSA benefit was attributable to federal service, her FECA wage-loss compensation had been adjusted, and that an overpayment of compensation could exist. On June 3, 2017 appellant informed OWCP that her address had changed to FPO, AE xxxx3.

On March 9, 2018 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$79,301.70 had been created. It explained that the overpayment occurred because appellant's SSA benefits that she received from March 15, 2011 to December 12,

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<sup>3</sup> The EN1032 forms signed by appellant provided: "Report any benefits received from the SSA which you receive as part of an annuity under the Federal Employees Retirement System (FERS). DO NOT report any benefits received from the SSA on account of employment in the private sector."

2015 was based on credits earned while working in the Federal Government, and that this was a prohibited dual benefit. OWCP found her at fault and provided an overpayment action request form and an overpayment recovery questionnaire (OWCP-20).<sup>4</sup> It informed appellant of the actions she could take and allotted 30 days for her to respond. The March 9, 2018 preliminary overpayment determination was mailed to her last known address at FPO, AE xxxx3.

On March 12, 2018 appellant submitted a change-of-address notice to APO, AE xxxx1. On March 19, 2018 OWCP resent the March 9, 2018 preliminary overpayment determination to her new address of record at APO, AE xxxx1.

By decision dated April 19, 2018, OWCP finalized the preliminary determination of a \$79,302.70 overpayment of compensation. It determined that appellant was at fault in the creation of the overpayment and, therefore, she was not entitled to waiver of recovery of the overpayment. OWCP set recovery at \$500.00 every 28 days from her continuing FECA compensation. The April 19, 2018 decision was mailed to appellant's address-of-record at APO, AE xxxx1.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>6</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.<sup>7</sup> FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup>

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<sup>4</sup> OWCP explained that appellant was to include supporting documentation with her completed overpayment recovery questionnaire, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed.

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see E.K.*, Docket No. 18-0587 (issued October 1, 2018).

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997).

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years.<sup>9</sup> Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$79,302.70.

In its April 19, 2018 decision, OWCP found that an overpayment of compensation was created for the period March 15, 2011 through December 12, 2015. The overpayment was based on the evidence received from SSA with respect to retirement benefits paid to appellant. A claimant cannot receive both compensation for wage loss and SSA retirement benefits attributable to federal service for the same period.<sup>11</sup> The information provided by SSA established that appellant received age-based SSA benefits that were attributable to federal service during the period March 15, 2011 through December 12, 2015.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS for specific periods commencing July 1, 2015 through July 22, 2017. OWCP provided its calculations for each relevant period based on the SSA worksheet. No contrary evidence was provided.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 15, 2011 through December 12, 2015 and finds that an overpayment of compensation in the amount of \$79,302.70 was created.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."<sup>13</sup>

Section 10.433(a) of OWCP regulations provides that OWCP:

"[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of

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<sup>9</sup> 20 C.F.R. § 404.310.

<sup>10</sup> *Id.* at § 404.409.

<sup>11</sup> *See E.K., supra* note 7.

<sup>12</sup> *See D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>13</sup> 5 U.S.C. § 8129; *see A.S.* Docket No. 17-0606 (issued December 21, 2017).

compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits.... A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”<sup>14</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment and thus not entitled to waiver of the recovery of the overpayment.

OWCP found appellant at fault based on the fact that she accepted a payment which she knew or should have known to be incorrect.

In EN1032 forms signed by appellant on February 23, 2012, February 24, 2013, March 24, 2014, and March 10, 2015, she indicated that she was not receiving SSA benefits as part of an annuity for federal service. This was not an accurate statement as, by SSA records, she was in fact in receipt of SSA retirement benefits effective March 15, 2011.

The EN1032 forms appellant completed provided:

“PART D -- OTHER FEDERAL BENEFITS OR PAYMENTS”

\* \* \*

“2. SSA Retirement Benefits. Report any benefits received from the SSA which you receive as part of an annuity under the FERS. DO NOT report any benefits received from the SSA on account of employment in the private sector.

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<sup>14</sup> 20 C.F.R. § 10.433(a); *see C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *see also* 20 C.F.R. § 10.430.

<sup>15</sup> *Id.* at § 10.433(b); *C.Y., id.*

a. Do you receive benefits from the SSA as part of an annuity for federal service? Yes or No: \_\_\_\_\_”

Based on the clear language of the forms which appellant knowingly signed, she failed to provide information she knew or should have known to be material and accepted payment she knew was incorrect.<sup>16</sup> The evidence thus establishes that she was at fault in the creation of the overpayment.<sup>17</sup>

Appellant did not timely respond to the preliminary overpayment determination that OWCP mailed to her on March 19, 2018, as such, she is not entitled to waiver of recovery of the overpayment.<sup>18</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of OWCP’s regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize hardship.<sup>19</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment of compensation by deducting \$500.00 every 28 days from appellant’s continuing compensation payments.

Although OWCP provided appellant with an overpayment recovery questionnaire, she did not submit a completed questionnaire or other financial information that OWCP requested prior to the 30 days allowed. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.<sup>20</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>21</sup> As appellant did not submit any financial information to OWCP as requested, the Board finds that there is no evidence in the record to show that OWCP

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<sup>16</sup> See *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

<sup>17</sup> *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>18</sup> *Id.*

<sup>19</sup> 20 C.F.R. § 10.441; see *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>20</sup> *Id.* at § 10.438.

<sup>21</sup> *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).

erred in directing recovery of the \$79,302.70 overpayment at the rate of \$500.00 per compensation period.<sup>22</sup>

Appellant argues on appeal that she was not given an opportunity to ask for waiver of recovery of the overpayment because she did not receive the March 19, 2018 preliminary determination until April 20, 2018. Under the mailbox rule, it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>23</sup> The record supports that the March 19, 2018 preliminary determination was sent to appellant's address of record at that time: APO, AE xxxx1, which appellant provided to OWCP on March 12, 2018. It was not returned to OWCP as undeliverable. Consequently, the preliminary overpayment determination is presumed to have been received under the mailbox rule.<sup>24</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$79,301.70 because she concurrently received SSA benefits while also receiving FECA benefits for the period March 15, 2011 through December 12, 2015. The Board further finds that she was at fault in the creation of the overpayment and, therefore, not subject to waiver of recovery of the overpayment, and that OWCP properly required recovery by deducting \$500.00 every 28 days from her continuing compensation payments.

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<sup>22</sup> See *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>23</sup> *P.P.*, Docket No. 18-0706 (issued October 26, 2018).

<sup>24</sup> See *T.N.*, Docket No. 17-0387 (issued November 28, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board